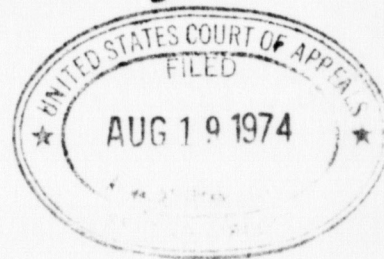


***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

74-1624



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA, :
Plaintiff-Appellee, : Docket No. 74 - 1624
-against- :
ELIZABETH CAROLYN DUNLAP, :
Defendant-Appellant. :
-----x

Appeal From the United States District Court
For the Southern District of New York

APPELLANT'S REPLY BRIEF

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UNITED STATES COURT OF APPEALS
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PRELIMINARY STATEMENT

The Government argues that there was sufficient evidence to support Mrs. Dunlap's conviction for aiding and abetting "the distribution of cocaine from co-defendant Andino to the undercover agents" (Government's Brief Page 5) and that the question of whether she acted at the behest of the buyer or the seller is irrelevant.

The appellant wishes to briefly reply to both of these contentions.

ARGUMENT

In order for one to be held culpable as an aider and abettor, it is necessary that a crime be committed by the principal offender for which the principal offender could be prosecuted [Manning v. Biddle, 14 F.2d 518 (8th Cir. 1926); Yenkichi Ito v. United States, 64 F.2d 73 (9th Cir. 1933)].

Assuming that such a principal offender can be identified, inquiry must then be made as to whether the alleged aider and abettor associated himself with the venture and participated in it as something which he wished to bring about and sought by his actions to make successful [United States v. Peoni, 100 F.2d 401 (2d Cir. 1938)].

It appears to be the Government's contention that, by virtue of the nature of the statutory violation alleged, it is unnecessary to identify who the principal offender was and whether Mrs. Dunlap did, in fact associate herself with the venture of this principal offender and seek by her affirmative actions to make it successful. The appellant believes this position to be incorrect.

Mrs. Dunlap was indicted for violating Title 21, United States Code, § 841(a)(1) in that she aided and abetted the distribution of a controlled substance, cocaine hydrochloride. The statute defines the term "distribute" as meaning "to deliver" [Title 21, United States Code, § 802(11)] and further defines the terms "deliver" and "delivery" as meaning "the actual, constructive, or attempted transfer of a controlled substance, whether or not there exists an agency relationship" [Title 21, United States Code, § 802(8)].

A principal offender under § 841(a)(1), therefore, is one who either transfers or attempts to transfer a controlled substance. It follows logically from this that for one to be held culpable as an aider and abettor under this statute it must be shown that he participated in the venture of the transferor and sought by his affirmative actions to aid the transferor.

If, on the other hand, there is evidence to indicate that the alleged aider and abettor was acting exclusively at the behest of the would-be transferee, he would not be culpable under the statute since the transferee, or purchaser, would not himself be culpable.

The Government relies upon United States v. Masullo, 489 F.2d 217 (2d Cir. 1973) for the proposition that "Dunlap aided and abetted the 'distribution' of cocaine whether she acted at the behest of Regan or Andino". (Government's Brief pp. 7-8) In Masullo, the appellant, Pare, conducted negotiations with the undercover agent for the sale of amphetamine. The sale took place in Pare's apartment and he was paid \$500.00 by the seller for his participation in the venture. From the trial court's refusal to give a "procuring agent charge" Pare appealed. The Court held that such a charge would be inapplicable where the crime was one of distribution rather than sale and, "[u]nder any view of the evidence, Pare was unquestionably actively seeking a transfer of the controlled substance . . . " [489 F.2d 217, 221].

Unlike Pare, there is no evidence that Mrs. Dunlap participated in any negotiations for the sale of the narcotics or that she realized any gain therefrom. There is, in fact, no evidence whatsoever which would indicate that Mrs. Dunlap

was acting in any capacity other than as the agent of the purchaser.

It was solely at the behest of the purchaser that Mrs. Dunlap agreed to introduce him to someone she thought might know where cocaine could be obtained. Once she had done this, her participation ended.

CONCLUSION

In order to be convicted for aiding and abetting the distribution of a controlled substance, it must be shown that the alleged aider and abettor participated in the venture of the transferor of the substance and sought by his affirmative actions to make that transfer successful.

The evidence in the instance case falls far short of meeting this test and the judgment of conviction should be reversed.

Respectfully submitted,

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